

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

EDWARD MOTLEY III,

Defendant-Appellant.

UNPUBLISHED
February 10, 2009

No. 280393
Wayne Circuit Court
LC No. 04-003587

Before: Wilder, P.J., and Cavanagh and Murray, JJ.

PER CURIAM.

Defendant appeals as of right his July 9, 2004, jury trial conviction of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (person under 13 years of age).¹ The trial court granted defendant's post-trial motion for a directed verdict on August 20, 2004. This Court reversed that order and reinstated the jury verdict on May 23, 2006.² Defendant was then sentenced on July 20, 2007, to 150 months to 20 years. We affirm.

Defendant first argues on appeal that the trial court abused its discretion in allowing the prosecutor to amend the information during trial to expand the dates of the offense. We disagree.

A trial court's decision to grant a motion to amend the information is reviewed for an abuse of discretion. *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008). "A trial court may permit amendment of the information at any time to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant." *Id.*; MCL 767.76; MCR 6.112(H). Prejudice may be found where the defendant has inadequate notice of or an insufficient opportunity to defend against a charge. *People v Goecke*, 457 Mich 442, 462; 579 NW2d 868 (1998); *People v Russell*, 266 Mich App 307, 317; 703 NW2d 107 (2005). A defendant can demonstrate prejudice if he can show that he would have proceeded

¹ Defendant was also acquitted of four counts of second-degree criminal sexual conduct (CSC II), MCL 520.520c(1)(a) (person under 13 years of age).

² *People v Motley*, unpublished opinion per curiam of the Court of Appeals, issued May 23, 2006 (Docket No. 258281).

differently at trial if not for a late amendment. *People v Hunt*, 442 Mich 359, 364; 501 NW2d 151 (1993).

The original information in this case charged defendant for conduct between June 30, 2003, and February 1, 2004. On cross-examination, defense counsel sought to impeach the victim with his preliminary examination testimony. As a result, the victim stated clearly that the assault in the summer of 2003 occurred in June. The prosecutor then sought leave to amend to expand the earlier date of the range to June 1, 2003. The trial court allowed defendant to present his defense before granting the motion.

During the trial, defendant did not present any evidence relating to the June events. Defendant's witnesses testified only regarding the events of January, 2004. Defendant filed a notice of alibi regarding January only. On appeal, defendant has not offered any indication of how he would have proceeded differently at trial. Further, he has not demonstrated how he was prejudiced by the amendment, beyond making a bare assertion of prejudice. We cannot conclude that the trial court abused its discretion in granting the prosecutor's motion.

Defendant next argues that the trial court abused its discretion in allowing the prosecutor to endorse a witness in the middle of the trial. We disagree. A trial court's decision on an evidentiary issue is reviewed for an abuse of discretion. *People v Yost*, 278 Mich App 341, 353; 749 NW2d 753 (2008).

At trial, the prosecutor sought to amend her witness list in order to add Dr. Mary Elizabeth Smyth, the physician who examined the victim. The prosecutor explained that when the witness list was constructed, she did not have a name for or a way to contact the examining physician. The trial court allowed the amendment so long as defense counsel was permitted an hour to interview Smyth before she testified.

MCL 767.40a(4) provides, "The prosecuting attorney may add or delete from the list of witnesses he or she intends to call at trial at any time upon leave of the court and for good cause shown or by stipulation of the parties." *People v Herndon*, 246 Mich App 371, 403; 633 NW2d 376 (2001). The trial court did not abuse its discretion in concluding that the prosecutor's inability to contact Smyth constitutes good cause shown. Further, defendant's argument that the introduction of Smyth's testimony was prejudicial is unconvincing. Smyth testified that she did not find any physical evidence of abuse on the victim. She further stated that it is not unusual for there to be a lack of evidence. The evidence was presented for the purposes of anticipating any questions by the jury regarding physical evidence. Defendant has not demonstrated how this testimony was prejudicial to his case. Further, defendant was given an opportunity to meet with Smyth and raise objections after that time, which he did not do. Because the testimony was not adverse to defendant's case and he was afforded an opportunity to talk to Smyth before her testimony, the trial court did not abuse its discretion in concluding the amendment to the witness list did not prejudice defendant.

Defendant argues in the alternative that Smyth's testimony was favorable to him and, therefore, should have been disclosed to him by the prosecutor before trial pursuant to *Brady v Maryland*, 373 US 83, 87; 83 S Ct 1194; 10 L Ed 2d 215 (1963). We disagree. This unpreserved issue is reviewed for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

A prosecutor has a duty to present exculpatory evidence to a defendant if it would raise a reasonable doubt about defendant's guilt. *Brady, supra* at 87; *People v Cox*, 268 Mich App 440, 448; 709 NW2d 152 (2005). In order to establish a violation of this duty, a defendant must prove:

(1) that the state possessed evidence favorable to the defendant; (2) that the defendant did not possess the evidence nor could the defendant have obtained it with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*Cox, supra* at 448 (labeling such violations "*Brady* violations").]

Smyth did not testify that the lack of physical evidence was in any way beneficial to defendant or that it could contribute to a reasonable doubt regarding defendant's guilt. She testified that it was not dispositive *either way* of the existence of a sexual assault. There is no indication that defendant's prior knowledge of this testimony would have had any impact on the outcome of the proceedings. Thus, there was no evidence subject to disclosure and no *Brady* violation.

Defendant next argues that the trial court erred in its response to the jury's request to read the victim's trial testimony transcript. We disagree. This unpreserved issue is reviewed for plain error affecting defendant's substantial rights. *Carines, supra* at 763.

During deliberations the jury requested the transcripts of the victim's testimony. The court explained that because there were no transcripts yet, the court reporter would read the victim's testimony to it. The court also stated that the jury could indicate when it had heard "the part [it was] interested in, unless [it was] interested in all of it." After an unspecified amount of reading (off the record), the jury indicated that it had heard enough and the reading was stopped.

Defendant argues that he was denied his right to due process because the trial court prevented the jury from hearing the entire transcript, especially the cross-examination. This contention is plainly contrary to the facts. The court gave the jury the opportunity to hear any or all of the victim's transcript that it required. MCR 6.414(J). Defendant does not offer any further explanation regarding how this conduct could be construed as preventing the jury from hearing the victim's testimony in its entirety. There was no plain error introduced by the court's conduct.

Defendant finally argues that the trial court erred in denying his motion for a new trial because it did not give "due regard" to the original trial court's conclusion that there was insufficient evidence in this case to convict defendant. The law of the case doctrine dictates that a ruling of law by an appellate court is binding on a trial court that hears the case on remand if the facts remain materially the same. *People v Kozyra*, 219 Mich App 422, 433; 556 NW2d 512 (1996). This Court held on the previous appeal in this case that there was sufficient evidence of penetration to support the jury's CSC I verdict. Specifically, this Court held that "anal opening," under the definition of sexual penetration, was not limited to the anal canal but could include the "crease of the buttocks." *Motley, supra*, slip op, p 3; MCL 750.520a(o). The trial court was bound by that ruling of law. *Kozyra, supra* at 433. Defendant's only argument in his motion for a new trial was that the original trial court was correct, despite this Court's reversal. The trial court did not abuse its discretion in rejecting this argument.

Affirmed.

/s/ Kurtis T. Wilder

/s/ Mark J. Cavanagh

/s/ Christopher M. Murray